SUPREME COURT, U. S.

FILED

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Supreme Court of the United States

OCTOBER TERM 1967

No. 39

HANK AVERY,

Petitioner,

against

MIDLAND COUNTY, TEXAS, et al.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF REVERSAL

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The Attorney General of the State of New York, by reason of his vital interest in the subject of county government structure and because of the volume of reapportionment litigation which has developed in our State, supported the suggestion of United States Solicitor General that this Court might wish to grant certiorari in this case (See our brief, dated March 15, 1967 in this case; October Term 1966, No. 958). Certiorari was granted June 12, 1967.

(1)

The New York Court of Appeals has already held that the principle stated in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), is applicable to local legislative bodies. *Seaman* v. *Fedourich*, 16 N. Y. 2d 94, 101 (1965). It has further held that the courts of New York "obligated as they are to uphold the Federal Constitution as well as the State's Con-

stitution—whose equal protection clause * * * is as broad in its coverage as that of the Fourteenth Amendment * * * are vested with jurisdiction of actions brought to vindicate the right to equal representation" (16 N. Y. 2d 94, 102).

In view of the holding in the *Seaman* case, which was followed in *Iannucci* v. *Board of Supervisors of County of Washington*, 20 N. Y. 2d 44 (July 7, 1967), and has been consistently followed by the lower courts in New York, the Attorney General advocates the extension of the "one person, one vote" principle to local legislative bodies. It has already been so extended in numerous New York cases. See, for example, *Goldstein* v. *Rockefeller*, 45 Misc. 778 (S. Ct., Monroe Co., 1965), where this office urged (pp. 782-783) such extension of the *Reynolds* principle.

(2)

We urge, however, that this Court, in extending the principle of "one person, one vote" to local legislative bodies permit adequate variety in the manner in which local governments may comply with this principle. The New York rule set forth in the *Seaman* case (*supra*) does not preclude local governments in New York, which have been granted a considerable degree of "home rule" power* from adopting many forms of local government, including those which provide for modified weighted voting, to achieve compliance with the principles of the *Reynolds* case. Even one of the most enthusiastic advocates of this Court's decision in *Reynolds* has recognized that this Court has "reserved to the states the traditional room for experimentation and maneuver". McKay,

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* See New York Constitution, Art. IX, §§ 1-3; and New York Municipal Home Rule Law (McKinney's Cons. Laws of New York, Book 35-C). The proposals of the current New York State Constitutional Convention relating to local reapportionment may prove to be more restrictive (See New York Times, Vol. CXVI, No. 40,038, Thursday, September 7, 1967, pp. 1, 21).

Reapportionment (1965, p. 254). See also, Dixon, *Reapportionment Memorandum on Floterial Districting, Population Variance Among States, And Additional Elements of Fair Representation''* (Dec. 5, 1966, pp. 31-34).

The leeway required for variety in providing fair representation of voters in local governmental affairs was recognized by the three-judge Court convened in *Blaikie* v. *Wagner,* 258 F. Supp. 364 (D.C.N.Y., 1965). That Court held that the *Reynolds* principle did not prevent a citywide limited voting system designed to afford representation to a minority party in each county of the city.

More recently, this need for variety was recognized in *Town of Greenburgh* v. *Bd. of Supervisors of Westchester County,* 49 Misc. 2d 116 (Sup. Ct., West. Co., 1966), 51 Misc. 2d 168 (1966); and 53 Misc. 2d 88 (1967), where former Presiding Justice NOLAN approved, in principle, a reapportionment plan providing for both weighted voting and multi-member districts, as a method of effectuating the ''one person, one vote'' principle.

In recognizing the need for an element of discretion in the manner in which county governments shall conform to the principle of ''one person, one vote'', Justice NOLAN stated (53 Misc. 2d 88, 103):

> ''Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to State legislative reapportionment plans may be permissible in county plans, and what may be permissible in one county may be unacceptable in another (*cf. Reynolds* v. *Sims, supra,* 377 U. S. 533, 578; *Swann* v. *Adams, supra*). The equal protection clauses do not require the application of rigid rules in all cases of

legislative apportionment, if varying circumstances justify a departure from them, in particular cases, or classes of cases. There are obvious differences between State legislative bodies and county boards of supervisors which justify a different approach to county reapportionment problems, than that which has been approved, so far with respect to state plans. The composition of boards of supervisors has been provided for by state laws presumably for reasons which the Legislature considered sufficient, and while those laws may be superseded under home rule powers, or charter provisions, there is no reason why a Board of Supervisors should not attempt to comply with them insofar as it may be possible to do so if that purpose can be effected without violation of the constitutional rights of the citizens of county. The towns and cities are political subdivisions of the county, and large or small, each has its problems which it does not share with neighboring towns, or cities, and in which its neighbors may have no interest whatsoever."

See also the most recent decision in the *Westchester* case, by Mr. Justice DILLON on August 23, 1967 where he found that the constitutionality of the mathematical structure of the Westchester County plan had been established by competent and reliable proof, based on computer analyses (Appendix A, annexed hereto, since it is not yet officially reported).

(3)

This Court's recent decision in *Sailors* v. *Board of Education of the County of Kent,* 387 U. S. 105 (1967), has been interpreted by Chief Judge FULD of our Court of Appeals as holding that "all of the constitutional principles which govern the apportionment of state legislatures are not necessarily applicable to the organization of local governments". *Iannucci* v. *Bd. of Supervisors*

(*supra*). The Chief Judge cited (20 N. Y. 2d 244, 250) the portion of Mr. Justice DOUGLAS' opinion in *Sailors* which stated (387 U. S., at pp. 110-111):

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

In the same case, Chief Judge FULD viewed this Court's decision in *Dusch* v. *Davis*, 387 U. S. 112 (1967), as an approval of Virginia Beach's "experimentation" in local government and as reflecting "a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolis" (20 N. Y. 2d, at pp. 250-251). As a supplemental authority for this proposition, Chief Judge FULD called attention (20 N. Y. 2d, at p. 251) to the decision in *Matter of Blaikie* v. *Power*, 13 N. Y. 2d 134, app. dism. 375 U. S. 439, sustaining the New York City measure to secure greater minority party representation in its City Council by assuring the election of at least five councilmen-at-large from parties other than the majority party in each of the City's five boroughs.* The dissent by Judge BREITEL in the *Iannucci* case regarded the *Sailors* and *Dusch* cases (*supra*) as recognizing that the "one man-one vote doctrine should not be applied with the same precision to local elective bodies as to State legislatures" and as pre-

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* After this Court vacated the three-judge District Court judgment in *Board of Supervisors of Suffolk County* v. *Bianchi*, 387 U. S. 97 (1967), the District Court (BRUCHHAUSEN, J., June 27, 1967), upon remand, dismissed the complaint therein for failure to state a cause of action, upon the ground that "population disparity, without other factors, does not render a local system unconstitutional". The Court of Appeals for the Second Circuit has not yet passed upon Judge Bruchhausen's disposition of the *Suffolk* case (Docket No. 31652, appeal docketed August 30, 1967). We are informed however, that the plaintiffs have also petitioned this Court for certiorari (No. 591, October Term, 1967).

venting any conclusion that weighted voting plans are "generically invalid" (20 N. Y. 2d 244, at p. 255).

Another recent New York case merits the Court's attention. In *Shanker* v. *Regents of Univ., N. Y.*, 27 A. D. 2d 84 (3rd Dept., 1966), aff'd 19 N. Y. 2d 951, upon the Appellate Division opinion (May 31, 1967), it was held that the election of members of the Board of Regents by the New York State Legislature did not violate the one man-one vote rule. New York Education Law, § 202, provides that the Board shall be composed of 15 members elected by the Legislature, one of whom shall be chosen from each of the 11 State's Judicial Districts, with 4 chosen at large (27 A. D. 2d, at p. 85). There was no question but that the populations of the Judicial Districts were disproportionate. Although it was assumed that the Board of Regents exercised "a legislative function", within the educational system because it possessed "rule-making powers", it was ruled that the Board had been created as "an administrative board" (27 A. D. 2d, at p. 86). The Appellate Division held that no constitutional right of the plaintiff was violated since the Board of Regents was not "a general elective organ" and the members of the Board were not "the elected representatives" of the plaintiff (27 A. D. 2d, at pp. 86, 87). The Court of Appeals (19 N. Y. 2d 951, 952), in affirming upon the opinion of the Appellate Division, cited as additional authority this Court's decision in *Sailors* (*supra*).*

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* The case at bar is distinguishable from the *Shanker* case. In Texas, the four precinct commissioners of the "Commissioner's Court" are elected *by the voters* of the precinct and their presiding officer, the county judge, is elected *by the voters* of the entire county.

A question is presented, however, as to the nature of the function of the Commissioners, whose primary function was regarded by the Supreme Court of Texas as administrative, rather than legislative (R. p. 145). Analysis of the nature of the functions of the Texas commissioners we leave to the Texas litigants and to the United States Solicitor General, who has informed us that he will deal with this subject.

CONCLUSION

Upon the assumption that the functions performed by the County Commissioners are determined to be substantially legislative, the one-man, one vote rule announced in *Reynolds* should apply. In that event, the judgment under review should be reversed.

Dated: New York, New York, September 13, 1967.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

Index No. 6859—1965

THE TOWN OF GREENBURGH, *et al.*,

Plaintiffs,

and

THE TOWN OF YORKTOWN, *et al.*,

Plaintiffs-Intervenors,

against

THE BOARD OF SUPERVISORS OF WESTCHESTER COUNTY, *et al.*,

Defendants.

DILLON, J.

This action for a declaratory judgment is now before the Special Term for the fourth time. It involves the problem of the reapportionment of seats and voting powers on the Board of Supervisors of Westchester County in accordance with the pronouncements of the United States Supreme Court in Gray v. Sanders, 372 U. S. 363, Reynolds v. Sims, 377 U. S. 533, and kindred cases. All previous proceedings in this matter have been before Mr. Justice Nolan, and the present application would undoubtedly have been referred to the same authority, by universal consent, except for his present assignment to the Appellate Division.

The three previous decisions have been to the following effect: On January 6, 1966, summary judgment was granted in favor of the plaintiffs declaring that the then-

existing apportionment of the Board was in violation of the equal protection clauses of the Federal and State Constitutions (49 Misc. 2d 116). In order to give the Board of Supervisors an opportunity to adopt a new and valid plan of apportionment, the court retained jurisdiction of the action for all purposes and granted leave to any party to apply at the foot of the judgment for appropriate relief. On July 6, 1966, the court disapproved a reapportionment plan adopted by the Board of Supervisors which established a 54-member board, and gave fractional voting rights to some municipalities and multiple voting rights to others, on the ground that the apportionment of voting power was not adequately related to the population base (51 Misc. 2d 168). The court directed, as a temporary measure, the use of a system of weighted voting, and remitted the matter to the Board for further consideration, again retaining jurisdiction for all purposes. On February 3, 1967, in a third decision, the court declined to give its approval to a new plan based on a method of apportionment described as "modified weighted voting," solely because the 204 votes allocated to the twelve representatives from Yonkers and the 76 votes allocated to the four representatives from New Rochelle had been divided equally without regard to the population of the individual city wards from which those representatives were to come (53 Misc. 2d 88). Under this plan a 54-member board would have cast a total of 861 votes, with each vote representing approximately 1,000 of population. Once again the court retained jurisdiction to await the further action of the Board of Supervisors.

Such further action has now been taken. With the aid of the Federal Bureau of the Census the ward populations of the cities of Yonkers and New Rochelle have been ascertained, with what would appear to be as much accuracy as can reasonably be expected, and the weighted votes of each supervisor in those two communities have

been allocated in accordance with ward populations. In the plan last considered by Mr. Justice Nolan, each Yonkers supervisor was to have 17 votes and each New Rochelle supervisor was to have 19 votes. In the proposed redistribution, based on ward populations, the weighted vote of the Yonkers representatives will vary from 15 to 21, while in New Rochelle there will be a variation of from 17 to 21. The total of 76 weighted votes allocated to the four representatives from New Rochelle remains unchanged. The total of 204 weighted votes allocated to the twelve representatives from Yonkers has been reduced to 202. The result of the 2-vote reduction in the voting strength of Yonkers has caused a reduction in the total voting strength of the Board from 861 (in the plan last presented to Mr. Justice Nolan) to 859. All these figures, and the evidence upon which they are predicated, are included in a report of the Board's Committee on Legislation which is submitted with the notice of Motion as Exhibit "I". A local law adopting the proposal as an amendment to the Westchester County Administrative Code was enacted by the Board on June 19, 1967, and was subsequently passed over the County Executive's veto on June 26, 1967.

The Board of Supervisors, one of the original defendants in the action, now moves for approval. The Town of Greenburgh, the original plaintiff, joins in the motion. The opposition comes mainly from the League of Women Voters whose representatives were permitted to intervene as parties plaintiff by an order made on October 24, 1966. The City of Mount Vernon has submitted a brief which seems to express disapproval. All the remaining political subdivisions of the County appear to be satisfied with the present plan, but of course the question of the constitutionality of the local law must be resolved without regard to the number of those who favor or oppose it. The only question before the court is whether this plan of apportionment complies with the equal protection clauses

of the Federal and New York State Constitutions, as interpreted by controlling decisions. The court may not be concerned with the merits of this plan as opposed to others, provided that it violates no constitutional mandate. The acceptability of this method of apportionment, if valid under the fundamental law, is a legislative question and must be submitted to popular referendum.

The three previous decisions made in this case (and especially the last) have served to narrow the issues to a very large extent. The conclusions reached in those decisions are the law of this case, and as such they are binding on the Special Term though not on courts of appellate jurisdiction. The following propositions must be deemed to be established, at least for the purposes of this application:

(1) That a system of weighted voting is not *per se* objectionable. This subject was discussed at length in the opinion of February 3, 1967, and the conclusion was reached that such a system of voting is valid provided it results in "effective legislative influence proportional to population." Very recently the Court of Appeals seems to have reached the same conclusion in Iannucci v. Board of Supervisors of County of Washington, 20 N Y 2d 44, July 7, 1967. There the Appellate Division, Third Department, had squarely held (27 A D 2d 346) that weighted voting was unconstitutional and that only a system of district representation based on population would satisfy the "one person-one vote" mandate of Reynolds v. Sims, *supra*. The Court of Appeals did not adopt this extreme view. It modified the Appellate Division order by remitting the matter to the Board of Supervisors with instructions to adopt a constitutionally valid plan of reapportionment; but it did so only on the ground that there was insufficient proof in the record to show that the weighted voting plan before the court gave every legislator the possibility, in

proportion to the population of his district, of casting a decisive vote. The fact that the majority did not hold that weighted voting in itself was unconstitutional was plainly spelled out in the dissenting opinion of Judge Breitel.

(2) That the plan presented to the court on the last application was, in general, an acceptable one and would have been approved except for the error of failing to apportion the votes of the Yonkers and New Rochelle legislators on the basis of ward population. No other conclusion can be drawn from the following language (53 Misc. 2d 88, at p. 99):

> "Weighted voting will or will not produce effective legislative influence, proportional to population according to the circumstances which may exist, in any given case, and the plan provided by the local law, if otherwise acceptable would, in the instant case, produce that result."

It was thus established, at least as the law of this case, that the Board of Supervisors had proposed a plan calculated in general to give effective voting power to all constituencies within the county.

(3) That the method of proof employed by the Board of submitting mathematical computations, made with the assistance of electronic computers, showing the relationship between each legislator's share of the total vote cast and the proportionate effectiveness of his vote in influencing legislation furnishes an acceptable basis for determining the validity of the plan. This may require some explanation. In any system of weighted voting it is not enough simply to allocate votes in proportion to district populations. If we assume, for example, an area of five districts, in which 60 per cent of the population resides in one district and 10 per cent resides in each of the other four, it

would be illusory to give 6 votes to the representatives of the large district and 1 vote each to the others. In such a case the four legislators from the small districts could never prevail against the one man with a majority of all the votes, and the constituents of those four legislators would be in practical effect unrepresented. To determine the validity of a weighted voting plan the process must not end with the simply ascertaining that each legislator has a number of votes proportionate to his share of the population. A further inquiry must be made to determine whether each legislator has voting rights which will enable him to influence legislation, at least in proportion to the size of his constituency. This can be done mathematically by determining, after considering every possible voting combination, each legislator's theoretical chance of casting a decisive vote. A mathematical table, showing the results of such computations, was accepted by Mr. Justice Nolan and made a part of his decision of February 3, 1967 (53 Misc. 2d 88, at p. 108). Of course the number of possible voting combinations on a 54-member board is astronomical, but it can be ascertained with the use of computers, as has been done here. Computer analyses were not only approved but mandated by the Court of Appeals in the Iannucci case, *supra*. In any event, this method of determining the *effective* vote of any legislator—that is, the possibility that his vote can actually influence legislation—has already been sanctioned by the court in this case.

(4) That a modified weighted voting plan which preserves the effective voting power of each representative should not be rejected because of mathematical calculations based upon unrealistic hypotheses and leading to the conclusion of inequality in citizen influence upon elected representatives. This argument is based upon Mr. Banzhaf's article in the Yale Law Journal on "Multi-Member Electoral Districts" (Vol. 75, No. 8, July, 1966,

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BRIEF FOR PETITIONER

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(2) That the plan presented to the court on the last application was, in general, an acceptable one and would have been approved except for the error of failing to apportion the votes of the Yonkers and New Rochelle legislators on the basis of ward population. No other conclusion can be drawn from the following language (53 Misc. 2d 88, at p. 99):

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It was thus established, at least as the law of this case, that the Board of Supervisors had proposed a plan calculated in general to give effective voting power to all constituencies within the county.

(3) That the method of proof employed by the Board of submitting mathematical computations, made with the assistance of electronic computers, showing the relationship between each legislator's share of the total vote cast and the proportionate effectiveness of his vote in influencing legislation furnishes an acceptable basis for determining the validity of the plan. This may require some explanation. In any system of weighted voting it is not enough simply to allocate votes in proportion to district populations. If we assume, for example, an area of five districts, in which 60 per cent of the population resides in one district and 10 per cent resides in each of the other four, it

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(4) That a modified weighted voting plan which preserves the effective voting power of each representative should not be rejected because of mathematical calculations based upon unrealistic hypotheses and leading to the conclusion of inequality in citizen influence upon elected representatives. This argument is based upon Mr. Banzhaf's article in the Yale Law Journal on "Multi-Member Electoral Districts" (Vol. 75, No. 8, July, 1966,

p. 1309). In that interesting but somewhat abstruse article the author demonstrates mathematically that the ability of constituents to affect the outcome of legislation through their representatives varies inversely as the square root of the population; and arrives at the conclusion that in any system including multi-member districts or in any system of weighted voting deviations in the degree of citizen influence will alway result. All of this reasoning is based upon the assumption that "each legislator would in effect poll his district on each issue and cast his vote according to the majority vote." This assumption ignores all the realities of representative government, and the conclusion reached can be no more reliable than the premise from which it starts. In any event, it is enough to say at this point that Mr. Justice Nolan discussed this question at length in his last decision, and concluded that nothing more should be required than a showing that "no citizen will be denied full and effective population-based representation through his elected representative or representatives" (53 Misc. 2d 88, at p. 104).

Upon the present application all four of the foregoing propositions must be regarded as established. They are not subject to reconsideration at Special Term. Of course, the situation might be otherwise if controlling decisions to the contrary had been made subsequent to any of the earlier determinations in this case. But the court knows of none. *Kilgerlin* v. *Hill*, 386 U. S. 120, which was decided within a matter of days after the last decision in this case, holds nothing to the contrary. The court in that case did no more than say that the plan of reapportionment there proposed was invalid because of significant inequalities in the population of the various districts involved. Nor does the court find anything in the recent ruling of the Court of Appeals in Iannucci v. Board of Supervisors of County of Washington, *supra*, which requires a modification of the

conclusions previously reached in this case. In the series of cases decided by the United States Supreme Court on May 22, 1967, (Moody v. Flowers, 387 U. S. 97, 18 L. Ed. 2d 643; Board of Supervisors of Suffolk County v. Bianchi, 387 U. S. 97, 18 L. Ed. 2d 643; Sailors v. Board of Education of County of Kent, 387 U. S. 105, 18 L. Ed. 2d 650; Dusch v. Davis, 387 U. S. 112, 18 L. Ed. 2d 656) there is nothing requiring a revision of any of the principles already established here.

What the court must now do, therefore, is determine whether the Board has adequately demonstrated the validity of the present plan in the light of the earlier rulings. It seems to have been determined in the *Iannucci* case that the burden of proof is upon the proponents of the reapportionment plan, and the court there said that "the only issue calling for resolution is the factual one pertaining to the mathematical structure of the plan." Several objections have been raised by those who oppose the motion.

The first is that the enumeration of the ward populations in Yonkers and New Rochelle was not established by competent or reliable evidence. The proof of what was done appears in the report of the Board's Committee on Legislation, which is annexed to the notice of motion and which was received in evidence as Exhibit I. The court entertains no serious doubt as to the competence of that evidence. As to its reliability, the great bulk of the information was received from the Federal Bureau of the Census, which is the proper method of approach (Seamen v. Fedourich, 16 N Y 2d 94). In a few instances, where enumeration districts cut across ward lines, supplementary information was obtained as described in the Committee's report. The court is of the opinion that the final results were as closely in accord with the census figures, and with the objective facts, as is reasonably possible. "Mathematical exactness or precision is hardly a workable con-

stitutional requirement'' (Reynolds v. Sims, 377 U. S. 533, 562). This objection is therefore overruled.

The further objection is raised that the moving parties have failed to sustain their burden of proving that the plan meets the constitutional standard of ''one person-one vote.'' The Court of Appeals pointed out, in the Iannucci case, *supra,* what kind of proof would satisfy that burden. The following quotation from the majority opinion is sufficiently explanatory:

> ''* * * the sole criterion is the mathematical voting power which each legislator possesses in theory—i.e., the indicia of representation—and not the actual voting power he possesses in fact—i.e., the indicia of influence. In order to measure the mathematical voting power of each member of these county boards of supervisors and compare it with the proportion of the population which he represents, it would be necessary to have the opinions of experts based on computer analyses.''

Proof of that precise kind has been furnished here. The Board of Supervisors has submitted the table annexed to the notice of motion and received in evidence as Exhibit L. This table is of the same character as Table II annexed to the February, 1967, opinion of Mr. Justice Nolan (53 Misc 2d 88, at p. 108), except that the figures differ slightly because of the rearrangement of the weighted votes in Yonkers and New Rochelle and the reduction by two of the total vote. It was established that Exhibit L had been prepared by Lee Papayanopoulos, a mathematician and computer expert with the International Business Machines Corporation. Mr. Papayanopoulos was not available as a witness at the hearing in this proceeding, but the proponents of the plan called one of his associates, Jerrold Rubin, also a mathematician and computer expert with the same company. Mr. Rubin testified that with the use of a computer, and employing the same data, he had reached

exactly the same results as shown in Exhibit L. What this exhibit shows is that under the present plan each legislator's share of the total vote correponds, except for minute fractions, with his *effective* voting power as previously defined. These computations comply fully with the requirements laid down by the Court of Appeals in the Iannucci case. They show "the mathematical voting power of each member" of the proposed Board as compared with "the proportion of the population which he represents." They show that no member will be left without the possibility of influencing legislation, and that his actual influence will be in proportion to the number of his constituents.

The opponents of the plan do not seriously challenge the accuracy of this proof. They fall back again on Mr. Banzhaf's theory that it is not the power of the legislator to influence action, but rather the power of the individual citizen to influence his legislator, which ought to be decisive of the validity of the apportionment. It has already been said that this question, as far as the Special Term is concerned, has been foreclosed by the previous ruling. But this court will add its own vote of agreement. No authoritative case has come to the court's attention which supports Mr. Banzhaf's theory. When one considers the number of imponderables which may affect the action of an elected representative in casting his vote on any hypothetical measure, it seems impossible to devise a formula capable of measuring mathematically the constituent's degree of influence upon the result in a practical world.

Procedurally, this motion would appear to be one for summary judgment. The motion is granted. A judgment may be submitted accordingly on notice.

Dated: White Plains, New York, August 23, 1967.

/s/ John J. Dillon.
JOHN J. DILLON,
J. S. C.